PERISHABLE AGRICULTURAL COMMODITIES ACT

REPARATION DECISIONS

J&J PRODUCE CO., INC. v. WEIS-BUY SERVICES, INC.
PACA Docket No. R-99-0103.
Decision and Order filed October 13, 1999.

Interstate Commerce – Present where both parties are located within a state, but shipment is outside the state.

Acceptance – By unloading of produce.

Rejection – Prohibited following acceptance.

Refusal to Accept Rejection – Impermissible except where rejection is ineffective.

Damages – Failure to render prompt and proper accounting precluded the award of damages as to shipment containing some misbranded tomatoes, and some tomatoes which were the wrong brand and color.

Complainant and Respondent contracted for the sale of a load of gassed green tomatoes of a specific brand and color. The invoices stated shipment was to be to the same address as Respondent's address within the state where they were grown. However, evidence showed that Complainant knew that the tomatoes were being shipped out of the state. It was held that there was interstate commerce. A federal inspection at destination showed that some of the tomatoes were misbranded, some were the wrong brand and some were shipped with the wrong color. All of these failings were held to constitute breaches of contract by Complainant. The tomatoes were unloaded prior to inspection, and Respondent, after seeing the results of the inspection, notified Complainant that the load was being rejected. Complainant refused to accept the rejection. Respondent's attempted rejection was held to be illegal and ineffective. Complainant's refusal to accept the rejection amounted merely to notice that the rejection was not deemed to be effective, and that Complainant would not accede to it in such manner as to constitute a modification of the contract. Respondent did not render a prompt and proper accounting, and no alternative method of assessing damages could be found.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Michael J. Keaton, Glen Ellyn, IL, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $13,824.65 in

connection with a transaction in interstate commerce involving a shipment of tomatoes.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondent which filed an answer thereto denying liability to Complainant.

The amount claimed in the formal complaint does not exceed $30,000.00, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's report of investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant did not file an opening statement. Respondent filed an answering statement. Complainant did not file a statement in reply. Both parties filed briefs.

Findings of Fact

1. Complainant, J & J Produce Co., Inc., is a corporation whose address is 6796 Lantana Road, Lake Worth, Florida.

2. Respondent, Weis-Buy Services, Inc., is a corporation whose address is 6225 Presidential Court, Suite D, Fort Myers, Florida. At the time of the transaction involved herein Respondent was licensed under the Act.

3. On or about March 20, 1998, Complainant agreed to sell to Respondent one truck load, consisting of 20 pallets, of 85 percent U. S. No. 1 or better "Cat's Meow" brand, gassed green tomatoes, to ship with 3½ to 4 color, on an f.o.b. basis. The load was purchased under two purchase orders: 15209 called for 480 cartons of extra large size, and 480 cartons of large size; 15208 called for 400 cartons of extra large size, 160 cartons of large size, and 80 cartons of medium size. At time of shipment on March 24, 1998, Complainant contacted Respondent and asked if the order could be filled out with No. 2 tomatoes since the grower was short on the tomatoes that had been ordered. Respondent replied that only the tomatoes ordered, with proper color, would do.

4. On March 24, 1998, Complainant shipped from loading point in Homestead, Florida, to Respondent's customer in Dayton, Ohio, one load consisting of 480 cartons of extra large tomatoes at $10.35; 480 cartons of large tomatoes at $8.35; 321 cartons of extra large tomatoes at $10.35; 80 cartons of large tomatoes at $8.35; and 138 cartons of medium tomatoes at $6.35, or a total of 1499 cartons for $13,842.65, f.o.b. Included on the load were 1,099 cartons of "Cats Meow" brand tomatoes which were labeled "vine ripe," and 400 cartons of "Sun Coast" brand tomatoes.

5. Following arrival at the place of business of Respondent's customer in Dayton, Ohio, the tomatoes were federally inspected following unloading. The certificate showed that the inspection took place on March 26, 1998, at 11:30 a.m., and revealed the following in relevant part:

LOT	TEMPERATURES	PRODUCT	BRAND/MARKINGS	ORIGIN	LOT ID.	NUMBER OF CONTAINERS	INSP. COUNT
A	66 to 67 °F	Tomatoes	"Cat's Meow" brand, Vine Ripe	FL	USDA Florida (236, 20610)	1,099 Cartons	Y
B	66 to 67 °F	Tomatoes	"Sun Coast" (6x7 or 6x6) Each lot: 25 Lbs Net Wt.	FL	(USDA FL 137 X C Wil)	400 Cartons	Y

LOT	AVERAGE DEFECTS		including SER DAM		including V. S. DAM		OFFSIZE/DEFECT	OTHER
A	04	%	00	%	00	%	Abnormal Coloring	A. Average approximately 25% green to breakers, 20% turning to pink. 50% light red to red.
	05	%	01	%	00	%	Bruising	
	03	%	00	%	00	%	Sunken Discolored Areas	
	00	%	00	%		%	Soft	
	-1	%	-1	%	-1	%	Decay	A. R
	13	%	02	%	01	%	Checksum	
B	02	%	00	%	00	%	Abnormal coloring	B. Average approximately 5% green to breakers, 35% turning to pink, 60% light red to red.
	04	%	01	%	00	%	Bruising	Net weight ranges 24.00 to 27.75, average 25.18 pounds per carton.

01	% 00	% 00	% Sunken Discolored Areas
00	% 00	% 00	% Soft
-1	% -1	% -1	% Decay
08	% 02	% 01	% Checksum

GRADE: Each lot: Meets marked weight.

REMARKS: Restricted to condition and net weight only at applicant's request.

6. Within a few hours after the inspection was completed Respondent's customer notified Respondent that the tomatoes were being rejected, and Respondent also notified Complainant that the tomatoes were being rejected. Complainant responded by a faxed message at 6:00 p.m. on the same day that it would not accept the rejection.

7. The formal complaint was filed on October 13, 1998, which was within nine months after the cause of action herein accrued.

Conclusions

Complainant seeks to recover the purchase price of the load of tomatoes. Respondent raised several defenses to Complainant's action.

First, Respondent alleges that the Secretary does not have jurisdiction over this matter because the tomatoes were sold to Respondent in Florida, and that there was, therefore, no interstate commerce. Respondent points to Complainant's invoices covering the two lots of tomatoes that made up the shipment. These invoices show the tomatoes as sold to Respondent at its address in Fort Myers, Florida, and also show the same information under the words: "SHIP TO." However, it is certain that the tomatoes were shipped from Florida to Ohio, and that Complainant alleges that it knew of the Ohio destination.[1] This is sufficient to show interstate commerce.[2]

Second, respondent alleges that the tomatoes shipped were the wrong color, and

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[1]Complainant alleges in the sworn complaint that "Complainant shipped . . . to Respondent's customer in the State of Florida . . . ." Respondent alleges in the sworn answer that the parties agreed that the color would be "3½ to 4 upon shipping in order to make 4½ to 5 upon arrival." If the contemplated place of arrival was Respondent's place of business within the State of Florida this increase in color could not have been expected.

[2]See *L. E. Rand Co., Inc. v Shur-Gain, Inc.*, 24 Agric. Dec. 499 (1965).

that some were labeled "vine ripe," although the contract called for gassed green tomatoes. At least part of this allegation is admitted by Complainant. Complainant stated in a letter to Respondent on March 26, 1998, immediately after receiving notice of rejection from Respondent, that: "The shipper ran out of lids - yet filled the order with "gassed" tomatoes." As Respondent points out, this amounted to the misbranding of a portion of the tomatoes. It also constituted a breach of the contract between the parties.

The Uniform Commercial Code, section 2 - 601, provides that ". . . if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (a) reject the whole . . . ." This is known as the perfect tender doctrine, and we have applied it in these proceedings.[3] The notice of rejection was timely, and if the rejection had been otherwise effective Complainant could not have refused to accept it. However the rejection was not effective, because it was illegal. Leaving aside the question of whether Complainant's invoices demonstrate sale and delivery inside the state of Florida (strenuously advocated by Respondent), and therefore an acceptance of the load in Florida, it is clear that the load was, at the very least, accepted when it was unloaded prior to inspection in Dayton, Ohio.[4] Any rejection after acceptance is a rejection without reasonable cause, and illegal under the Department's Regulations,[5] as well as impermissible under the Uniform Commercial Code.[6]

The only context in which a refusal to accept a rejection has any meaning is

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[3]See *Harvey Kaiser, Inc. v. Kay Packing Company*, 52 Agric. Dec. 762 (1993) where there was a tender of cabbage in wooden boxes when the contract excluded wooden boxes.

[4]See 7 C.F.R. § 46.2(dd)(1). See also *M. J. Duer & Co., Inc. v. The J. F. Sanson & Sons Co. and C. H. Robinson Co.*, 49 Agric. Dec. 620 (1990); *Theron Hooker Co. v. Ben Gatz Co.*, 30 Agric. Dec. 1109 (1971). *Charles P. Tatt Fruit Co. v. Mac's Produce*, 9 Agric. Dec. 802 (1950).

[5]7 C.F.R. 46.2(bb)(4). See *Phoenix Vegetable Distributors v. Randy Wilson, Co.*, 55 Agric. Dec. 1345 (1996).

[6]U.C.C. § 2 - 607(2). Although Respondent did not allege revocation of acceptance, it is doubtful whether Respondent could overcome the hurdle that requires that the non-conformity substantially impair the value of the goods accepted. See U.C.C. § 2 - 608(1).

when the rejection is ineffective.[7] In such a case it merely signals the buyer that the seller does not deem the rejection to be effective, and will not accede to it in such a manner as to constitute a modification of the contract. Here, whatever Complainant's intention, this was its only effect.

Since the tomatoes were accepted, Respondent became liable for their contract price, less any damages resulting from any proven breach of the contract. We have already stated that Complainant has admitted the breach constituted by the misbranding of some of the tomatoes as vine ripe when they were in fact gassed green tomatoes. Respondent also contends that there was a breach by a failure to supply the correct brand and by a failure to supply the proper color. Respondent's Jack Goldstein gave two sworn affidavits concerning the terms agreed to when the tomatoes were ordered. In a letter to this Department that was included as a part of the Department's Report of Investigation Mr. Goldstein identified the person with whom he negotiated as Brian. This was presumably Complainant's sales manager Brian Rayfield. However, although there were several unsworn letters from Brian Rayfield included in the Report of Investigation, there was no sworn statement by Mr. Rayfield submitted in evidence. Generally speaking, statements not under oath, even though in evidence as exhibits to the Department's Report of Investigation, are not given as much weight as affidavit testimony.[8] We have accepted Respondent's contention that the contracted brand was "Cat's Meow," and, therefore, there was clearly a breach as to brand as to 400 of the cartons of tomatoes. We have also accepted Respondent's representation that the tomatoes were to ship with 3½ to 4 color, and the federal inspection shows that there was a

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[7]In *Cal/Mex Distributors, Inc. v. Tom Lange Company, Inc.*, 46 Agric. Dec. 1113 (1987), we pointed out that "[i]n the context of the vast majority of rejection situations, the use of terminology referring to an 'acceptance of a rejection' is both superfluous and meaningless. We have held many times that a seller has a positive legal duty to accept any rejection that is effective, even if the rejection is substantively wrongful. *Yokoyama Bros. v. Cal-Veg Sales*, 41 Agric. Dec. 535 (1982); *Produce Brokers & Distributors v. Monsour's*, 36 Agric. Dec. 2022 (1977); *Bruce Church, Inc. v. Tested Best Foods Div.*, 28 Agric. Dec. 377 91969). The only situation in which a seller can refuse to 'accept a rejection' in the sense of refusing to take possession of 'rejected goods' is where the rejection is ineffective. *Dew-Gro, Inc. a/t/a Central West Produce v. First National Supermarkets, Inc.*, 42 Agric. Dec. [2020] (1983). This is, of course, the necessary result in the case of an ineffective rejection because an ineffective rejection has the same legal consequences as an acceptance, and legal title is not reinvested in the seller. As White and Summers state, in such a case, 'even if the goods are nonconforming, the parties will be treated as though no rejection has occurred.' White and Summers, Uniform Commercial Code, Sec. 8-3, p.265 (1972)."

[8]*Empire Foods, Inc. v. Fir Grove Farm*, 16 Agric. Dec. 202 (1957); *Anonymous*, 8 Agric. Dec. 598 (1949).

breach as to some of the tomatoes in regard to color.

Since Respondent accepted the tomatoes it became liable to Complainant for the purchase price thereof, less damages resulting from the breaches of contract. As to accepted goods, the Uniform Commercial Code, section 2-714(2), provides that:

> The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

The value of the goods accepted may be shown by the results of a prompt and proper resale. Respondent moved the subject tomatoes to H. R. Bushman and Son Corp. in St. Louis, Missouri for resale. Without commenting on the propriety of moving the tomatoes to a distant market, we note that Bushman did not render a proper accounting. The accounting lumps the tomatoes together under the three sizes, and reports an average price for each size. Thus there is no break down of the sales by lot. More important was the failure to state the dates on which sales were completed. The accounting itself is dated May 8, 1998, or six weeks after delivery of the tomatoes to their original destination. There is no way for us to say that the resale of the tomatoes was prompt. In the absence of a prompt and proper accounting we frequently use the percentage of condition defects as a means of assessing damages. However, the subject tomatoes did not arrive at destination with excessive condition defects. We have consulted Market News Reports for several locations with some proximity to Dayton, Ohio, in an effort to assess damages by a reported difference in price for tomatoes from Florida that showed different color. However, we were unable to find any quotations that were relevant. We are forced to conclude that Respondent has not shown any damages resulting from any of the breaches of contract. Accordingly, Respondent is liable to Complainant for the full contract price of the tomatoes, or $13,824.65. Respondent's failure to pay Complainant this amount is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in

consequence of such violations." Such damages include interest.[9] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[10] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal complaint. Pursuant to 7 U.S.C. 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this order respondent shall pay to complainant, as reparation, $13,824.65, with interest thereon at the rate of 10% per annum from April 1, 1998, until paid, plus the amount of $300.

Copies of this order shall be served upon the parties.

J&C ENTERPRISES, INC. v. HOMELAND PRODUCE.
PACA Docket No. R-99-0130.
Decision and Order filed November 1, 1999.

Damages

Returned check bank fees awarded as consequential damages.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

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[9]*L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[10]See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed with the Department, in which Complainant seeks a reparation award against Respondent in the amount of $5,375.00 in connection with five trucklots of mixed fruits and vegetables shipped in the course of interstate commerce.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon the Respondent, which filed an answer thereto, denying liability to Complainant in the amount claimed but not specifying the amount for which it admits liability.

Since the amount claimed in the formal complaint does not exceed $30,000.00, the shortened method of procedure provided in section 47.20 of the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered part of the evidence of the case, as is the Department's Report of Investigation. In addition, the parties were given the opportunity to file evidence in the form of verified statements and to file briefs. Complainant filed an opening statement. Respondent did not file any additional evidence. Neither party filed a brief.

Findings of Fact

1. Complainant, J & C Enterprises, Inc. ("J&C"), is a corporation whose post office address is 1221 North Venetian Way, Miami, Florida 33139. At the time of the transactions involved herein, J&C was licensed under the Act.

2. Respondent, Homeland Produce ("Homeland"), is a corporation whose post office address is 10660 Wireway #209, Dallas, Texas 75220. At the time of the transactions involved herein, Homeland was licensed under the Act.

3. On or about December 19, 1997, through January 27, 1998, J&C sold to Homeland, and shipped from loading point in the state of Florida, to Homeland in Dallas, Texas, five trucklots of mixed fruits and vegetables, as follows:

INVOICE NUMBER	SHIP DATE	QUANTITY/COMMODITY	INVOICE AMOUNT	INVOICE BALANCE
063218	12/19/97	48 CTNS. MXD VEG	$1,414.00	$ 95.00
063614	01/02/98	95 CTNS. MXD VEG	$1,475.00	$1,475.00
063983	01/13/98	53 CTNS MXD FRT & VEG	$1,281.00	$1,281.00
064260	01/20/98	62 CTNS MXD VEG	$1,269.00	$1,269.00

064507	01/27/98	70 CTNS MXD VEG	$1,205.00	$1,205.00
			TOTAL	**$5,325.00**

4. Homeland attempted to make the following payments however all of the checks were returned for insufficient funds:

- ◆ $310.00 toward an unspecified invoice with check number 2514;
- ◆ $581.00 toward invoice 063983 with check number 2516;
- ◆ $941.00 toward invoice 064507 with check number 1257; and
- ◆ $1,069.00 toward invoice 064260 with check number 1962.

5. In addition to the invoice balance of $5,325.00, J&C is claiming bank charges of $50.00, or $10.00 per check, for the returned checks (J&C made two attempts to deposit check number 1962), thereby bringing the total amount claimed to $5,375.00.

6. An informal complaint was filed on March 30, 1998, which is within nine months from when the cause of action accrued.

Conclusions

Complainant J&C brings this action to recover the unpaid balance of the agreed purchase prices for five trucklots of mixed fruits and vegetables sold to Respondent Homeland. J&C states that Homeland accepted the products, but that it has since paid only $1,319.00, thereby leaving invoice balances due totaling $5,325.00. As the proponent of this claim, J&C has the burden of proving its allegations by a preponderance of the evidence.[1] In this regard, J&C attached to the formal complaint copies of its invoices billing Homeland for the mixed fruits and vegetables, along with copies of signed bills of lading evidencing receipt by the carrier of each of the five shipments.[2]

In its unverified answer, Respondent Homeland does not deny receipt and acceptance of the five trucklots of mixed fruits and vegetables, but states merely that the amount due J&C is less than the amount claimed. A buyer who accepts produce becomes liable to the seller for the agreed purchase price thereof, less any

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[1]*Sun World International, Inc. v. J. Nichols Produce Co.*, 46 Agric. Dec. 893 (1987); *W.W. Rodgers & Sons v. California Produce Distributors, Inc.*, 34 Agric. Dec. 914 (1975); *New York Trade Association v. Sidney Sandler*, 32 Agric. Dec. 702 (1973).

[2]See Formal Complaint Exhibits 2, 2A, 3, 3C, 4, 4B, 5, 5C, 6, and 6A.

damages resulting from any breach of contract by the seller.[3] The burden of proof to show a breach and damages rests upon the buyer. In this regard, Homeland alleges that some of the products received were not in accordance with the contract requirements, however Homeland did not submit any evidence to support this allegation. Consequently, in the absence of proof of a breach of contract by J&C, we find that Homeland remains liable to J&C for the unpaid balance of the agreed purchase prices for the five trucklots of mixed fruits and vegetables received and accepted, totaling $5,325.00. J&C also submitted receipts showing that it incurred $50.00 in bank charges for the insufficient fund checks remitted by Homeland. We find that Homeland is entitled to reimbursement for the bank charges as consequential damages. This brings the amount due J&C from Homeland to $5,375.00.

Respondent Homeland's failure to pay Complainant J&C $5,375.00 is a violation of section 2 of the Act for which reparation should be awarded to J&C. Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages also include interest.[4] Since the Secretary is charged with the duty of awarding damages, he/she also has the duty, where appropriate, to award interest.[5] Complainant J&C in this action paid $300.00 to file its formal complaint. Pursuant to 7 U.S.C. § 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party.

Order

Within 30 days from the date of this Order, Respondent Homeland shall pay Complainant J&C as reparation $5,375.00, with interest thereon at the rate of 10% per annum from March 1, 1998, until paid, plus $300.00 for handling fees.

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[3] *Norden Fruit Co., Inc. v. E D P Inc.*, 50 Agric. Dec. 1865 (1991); *Granada Marketing, Inc. v. Jos. Notarianni & Company, Inc.*, 47 Agric. Dec. 329 (1988); *Jerome M. Matthews v. Quong Yuen Shing & Co.*, 46 Agric. Dec. 1681 (1987).

[4] *Louisville & Nashville Railroad Co. v. Sloss Sheffield Co.*, 269 U.S. 217 (1925); *Louisville & Nashville Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[5] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Co., Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W.D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

Copies of this Order shall be served upon the parties.

BIG APPLE PINEAPPLE CORPORATION v. FASHION FRUIT COMPANY AND/OR CHOICE SEAFOOD, INC.
PACA Docket No. R-99-0128.
Decision and Order filed December 16, 1999.

Evidence – Admissibility of taped phone conversation.
Agency – Liability of other party to agent's disclosed or partially disclosed principal.
Agency – Liability of agent to principal.
Handling Fee – Joint and several liability.

Federal statute making it illegal to intercept phone calls, and making intercepted messages inadmissable in evidence, has an exception for conversations taped by a party to the conversation. It was not proven that the law of Florida made such recordings illegal, or that, if it did, it was applicable to the facts of the case, or should take precedence over federal law as to admissibility. An agent who acted on behalf of a disclosed or partially disclosed principal subjected the other party to liability to the same extent as if the principal had conducted the transaction. Where the other party bought produce from the principal through the agent, and paid the agent who was not authorized to receive payment, and such payment was over the objection of the principal, the other party was liable to the principal for the full value of the produce. The agent who took payment, and did not forward it to its principal, was liable jointly and severally with the purchaser to the principal for the amount received from the purchaser. Such agent was also not entitled to brokerage fees where it acted without authority in accepting payment for the produce. Where two respondents both violated the Act they were held jointly and severally liable for the handling fee.

George S. Whitten, Presiding Officer.
Complainant, Pro se.
Respondent, Pro se.
Decision and Order issued by William G. Jenson, Judicial Officer.

Preliminary Statement

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). A timely complaint was filed in which Complainant seeks an award of reparation in the amount of $22,211.75 in connection with two transactions in foreign commerce involving pineapples.

Copies of the Report of Investigation prepared by the Department were served upon the parties. A copy of the formal complaint was served upon Respondents. Fashion Fruit Company filed an answer denying liability to Complainant, and Choice Seafood, Inc. defaulted in the filing of an answer.

The amount claimed in the formal complaint does not exceed $30,000.00, and therefore the shortened method of procedure provided in the Rules of Practice (7 C.F.R. § 47.20) is applicable. Pursuant to this procedure, the verified pleadings of the parties are considered a part of the evidence in the case as is the Department's Report of Investigation. In addition, the parties were given an opportunity to file evidence in the form of sworn statements. Complainant filed an opening statement, and Respondent Fashion Fruit Company filed an answering statement. Complainant filed a statement in reply. Both Complainant and Respondent Fashion Fruit Company filed briefs.

Findings of Fact

1. Complainant, Big Apple Pineapple Corporation, is a corporation whose address is 316 East 53 Street, New York, New York.

2. Respondent, Fashion Fruit Company (hereafter sometimes Fashion), is a corporation whose address is P. O. Box 800204, Aventura, Florida. At the time of the transactions involved herein this Respondent was licensed under the Act.

3. Respondent, Choice Seafood Inc. (hereafter sometimes Choice), is a corporation whose address is 1471 S.W. 30th Avenue, Suite 5, Deerfield Beach, Florida. At the time of the transactions involved herein this Respondent was not licensed under the Act, but was operating subject to license.

4. Sometime prior to April 19, 1998, Complainant, acting through its president, Joseph S. Natoli, enlisted the services of Choice (which acted through its representative Joseph F. Colozza) to sell, on Complainant's behalf, two loads of pineapples which were to be imported from the Dominican Republic. Joseph F. Colozza represented to Complainant that Publix Supermarkets, Win Dixie, and Flemming Companies were going to purchase the pineapples, however, Colozza, acting for Choice, secured the agreement of Fashion (which acted through its representative Isaac Rosenberg) to purchase the two loads of pineapples on a price after sale basis.

5. Prior to the delivery of the two loads Fashion learned that Choice was acting as agent for a New York firm in regard to the sale of the pineapples. Upon delivery of the first of the two loads on April 24, 1998, it was agreed between Choice and Fashion that the pineapples should be handled by Fashion on a consignment basis. Also on April 24, 1998, Complainant informed Fashion that the lowest acceptable return on the pineapples would be $10.25 per case. Thereafter Natoli talked to Rosenberg frequently, and let Rosenberg know that payment was expected direct to Complainant.

6. On May 18, and 20, 1998, Complainant invoiced Fashion showing both

"price after sale," and a price based on its calculation of market price. The invoices, which were numbered 7684 and 7689, had the notation: "'Special Instructions' Submit payment to: Big Apple Pineapple Corp." On May 26, 1999, Rosenberg informed Natoli that he intended to send the accountings, and all proceeds from the sale of the pineapples, to Choice. On June 3, 1998, Complainant's Joseph Natoli, under a Big Apple Pineapple Corp. letterhead, sent a letter to Isaac Rosenberg at Fashion Fruit Company. The letter stated, in relevant part, as follows:

> Please be advised that all proceeds and accounting from the goods shipped to Fashion Fruit (Invoice No's. 7684/7689 are to be paid to Big Apple Pineapple Corp. directly. Choice Sea Food and or Mr. Joseph Colozza are absolutely not authorized to receive the proceeds. Any such action on your part or that of Fashion Fruit of sending the proceeds else where, will result in Big Apple Pineapple Corp. proceeding with legal action against your firm.

On June 16, 1998, Fashion paid Choice $4,182.15 as the purported net proceeds from the sale of both containers of pineapples.

7. The formal complaint was filed on September 22, 1998, which was within nine months after the causes of action herein accrued.

Conclusions

Complainant submitted as an exhibit to its formal complaint a copy of a tape recording of conversations between Complainant's Joseph S. Natoli and Respondent Fashion's Isaac Rosenberg. Respondent Fashion has strenuously objected to this recording being considered as evidence in this proceeding. In furtherance of this objection Fashion's attorney has contended that the making of the recording was a violation of both federal and Florida law. As to federal law, Fashion's attorney cited 18 U.S.C. 2511, and 2515, and quoted selectively from each section. Section 2511 makes it illegal to intercept any wire, oral, or electronic communication, and section 2515 provides that illegally intercepted matter cannot be received in evidence in federal proceedings. However, Fashion's attorney did not include in his quotation of section 2511 any part of paragraph (2). Paragraph (2), which is broken down into many subparagraphs, lists all the exceptions whereby interceptions of electronic communications will not be considered illegal. One of these subparagraphs to paragraph (2) is very pertinent to the issue being considered:

> (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.[1]

We conclude on the basis of this subparagraph that the interceptions of the phone conversations by Mr. Natoli were not violations of federal law since Mr. Natoli was a party to the conversations which he taped, and because the interceptions have not been shown to have been for the purpose of the violation of the Constitution or laws of the United States or of any state.

Fashion's attorney also quotes selectively from Florida law, and contends that Mr. Natoli violated that law as well.[2] However, we are unable to place any confidence in this selective quotation, or in the interpretation made of Florida law. Moreover, there has been no showing that the taping took place in Florida, and we assume that it took place in New York where Mr. Natoli's business is located. If it were contended that Florida law was nevertheless violated because one of the parties to the conversation was located in Florida, no citation has been made to any authority supporting this proposition. In addition, it has not been shown that a violation of the Florida statute should cause us to exclude the tape from evidence in this proceeding.[3] We conclude that Fashion has not shown that Florida law was violated by the taping of the conversations, or that, if it was, such has any relevancy to this proceeding.

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[1]18 U.S.C. 2511(2)(d).

[2]We are not suggesting that Fashion's attorney failed to disclose that the quotations were incomplete. However, we are surprised that the very relevant subparagraph (d) of the federal statute was omitted from the quotation, no doubt through oversight.

[3]See *U.S. v. D'Antoni*, 874 F2d 1214 (7th Cir. 1989), where defendants in a federal criminal trial argued that because a taped conversation was obtained in violation of state law it should not be admissible in federal court. The tape was admissible under the federal statute because the intercepting person was a party to the conversation, and the court held that federal standards governed the admissibility of the evidence. See also *By-Prod Corp. v. Armen-Bering Co.*, 668 F.2d 956 (7th Cir. 1982), a civil trial, where the court stated "a desire to make an accurate record of a conversation to which you are a party is a lawful purpose under the statute even if you want to use the recording in evidence."

In spite of our conclusions set forth above, we have not relied on the tape submitted by Complainant. There are several reasons for this. First, the tape is of poor quality and substantial portions of it are unintelligible. Second, there are numerous gaps in the tape which apparently represent erasures. Perhaps erasures were made to exclude irrelevant parts, and enable relevant parts to be more readily found. However, there is no testimony from the person who made the tape to explain these concerns.[4] Third, apparently not only entire conversations have been removed, but portions of the relevant conversations that are left have been removed also. Fourth, there was no sworn statement submitted from the person who made the recording that the tape had not been tampered with, and that it truly represented the conversations recorded. Fifth, the relevant matters which Complainant seeks to establish by means of the tape are adequately established by other evidence.

The Findings of Fact are based upon our careful analysis of the evidence of record exclusive of the tape recording. Some additional matters are worthy of mention. There are no early invoices from Choice to Fashion, only a late invoice dated June 16, 1998, covering both containers and stating the amount of the net proceeds as dictated to Choice by Fashion, namely $1,753.20 on the first container, and $2,428.95 on the second container. There is no document in writing that relates to the initiation of the transactions between Choice and Fashion except an ambiguous Ap. 23, 1998 letter. That letter, addressed to Isaac Rosenberg, states as follows:

> A COMPANY IN NEW YORK HAS ASKED US TO SEE IF THERE IS A MARKET FOR THEIR "ALL NATURAL PINEAPPLES', GROWN IN THE DOMINICAN REPUBLIC. THERE (sic) SAMPLES SEEM PRETTY GOOD ALL # 5's.
>
> WE HAVE PRESENTED THEM TO SOME OF OUR CUSTOMERS AND THE RESPONSE HAS BEEN GOOD. WOULD YOU HANDLE THE NEXT FEW LOADS, TO VEVERIFY (sic) THE SIZES, QUALITY, AND PACKAGING, ETC. THE FIRST LOAD HAS ARRIVED IN MIAMI IT SHOULD CLEAR U.S. CUSTOMS BY TOMORROW. CALL ME IF (illegible). YOU MIGHT EVEN HAVE A FEW CUSTOMERS OF YOUR OWN. LET ME KNOW, THERE COULD BE SOME LONG

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[4]The proper way to submit a legally made tape recording in evidence would be to submit the entire tape, together with a transcript of the relevant portions of relevant conversations. The submission should be accompanied by a sworn statement from the person who made the recording that it has not been tampered with, and truly represents the conversations recorded. The original must be made available, upon request, to the other party to the proceeding for expert analysis.

TERM BUSINESS TO BE DONE IF THE PRODUCT IS ALL THAT IT IS REPRESENTED AS BEING. I LOOK FORWARD TO HEARING FROM YOU.

SINCERELY,

JOSEPH F. COLOZZA

After Mr. Rosenberg was first contacted by this Department with notice of the informal complaint, he replied in a letter dated June 22, 1998. In this letter he stated that "[w]e, Fashion Fruit, had a written agreement with Choice Seafood to sell the load and to remit all the documents and funds directly to them." The above quoted letter is as close as the record comes to supplying the "written agreement." Clearly it falls far short of the description made by Mr. Rosenberg. If a written agreement, answering to the description made above by Rosenberg, between Fashion and Choice ever existed, it was never submitted in evidence.

Mr. Colozza replied, on July 20, 1998, to the inquiry of this Department about his involvement in the transactions. Although when Colozza made a statement much later at the request of Fashion his description of the transaction was more in keeping with Fashion's view of the transactions, the July 20, 1998, response was far more vague:

> In response to your letter of July 7, 1998, please be advised that Choice Seafood, having been asked by the Big Apple Pineapple Co. to sell its fresh pineapple, asked the Fashion Fruit Co. to evaluate and verify what was to be sent to us.
>
> We secured customers based upon the product samples we received. However, after Fashion Fruit received the product, it informed us that the sizes of the pineapples were much smaller than represented. This presented problems not only with our customers but for all sales. It was then agreed to sell the product at the "after sale price". This was the case not only with the first container but the second as well. . . .
>
> . . .

We conclude that Choice acted as Complainant's broker, and that while Complainant may have initially been an undisclosed principal, it became a partially disclosed principal prior to the delivery of the first load, and soon thereafter became a fully disclosed principal. We explicitly reject the contention that Choice ever purchased from Complainant, or that Fashion purchased from Choice. The

record shows that Fashion was made amply aware at an early stage of the transactions, certainly well before the payment to Choice, of Complainant's ownership of the goods. An agent acting on behalf of a disclosed or partially disclosed principal subjects the other party to liability to the principal to the same extent as if the principal had conducted the transaction.[5] There has been no showing that Complainant authorized Choice to collect and remit on behalf of Complainant. The payment which was made by Fashion to Choice was wrongful as against Complainant.[6] Choice's solicitation of the payment was wrongful as against its principal and forfeits any claim to a brokerage fee. Choice's retention of the payment received is also wrongful, and a violation of section 2 of the Act for which it is liable to Complainant.

Respondent Fashion did not issue a detailed accounting, but did supply sufficient data from which a detailed accounting can be constructed. The summary accounting issued by Fashion relative to the first load (Complainant's invoice No. 7684; Lot No. 8841) shows total sales of $5,142.00; expenses as cooling - $633.10, trucking - $1,347.50, misc. - $394.00, and commission - $514.20; net proceeds are shown as $2,253.20. However, the net proceeds actually paid to Choice on this load were $1,753.20. We are unable to discern the reason for the difference. The summary accounting issued by Fashion relative to the second load (Complainant's invoice No. 7689; Lot No. 2589) shows total sales of $5,066.00; expenses as cooling - $722.00, freight - $824.00, trucking - $85.05, commission - $506.60; net proceeds are shown as $2,928.35. However, the net proceeds actually paid to Choice on this load were $2,428.95. Again, we are unable to discern the reason for the difference.

Our constructed accounting for the two loads, based on invoices supplied by Fashion, appears below:

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[5]See W. Seavey, *Handbook of the Law of Agency*, §108, p. 195-96, (1964). See also *Produce Services & Procurement, Inc. v. Mark J. Vestal, d/b/a Western Pacific Produce*, 55 Agric. Dec. 1284 (1996).

[6]See *Alexander Marketing v. Gram & Sons, Inc. and/or Harry Caito Produce Co.*, 30 Agric. Dec. 439 (1971).

Inv. 7684; Lot 8841

Shipping Dt.	Inv. No.	Customer	Quantity	Price	Extension
4/27	34065	JJ Produce Co., Bronx, N.Y.	60 5ct.	$10.00	$ 600.00
4/27	34075	Culinary Specialty, Mountainside, N.J.	64 5ct.	8.00	512.00
			50 7ct.	8.00	400.00
4/27	34076	Cooseman Atlanta, Forest Park, GA	50 6ct.	4.00	200.00
4/27	34077	Cooseman New York, Bronx, N.Y.	225 (75 6ct., 75 7ct., 75 8ct.)	5.52	1,242.00
4/30	34088	JJ Produce Co., Bronx, N.Y.	61 6ct.	10.00	610.00
			82 7ct.	8.00	656.00
5/13	35033	Four Seasons Produce, Denver, PA	5 8ct.	10.00	50.00
			597		$4,270.00

Invoice No. 7689; Lot 2589:

4/30	34088	JJ Produce Co., Bronx, N.Y.	59 6ct	$10.00	$ 690.00
			38 7ct.	8.00	304.00
5/2	35002	Oriole Kosher	40 8ct.	8.00	320.00
5/2	35005	Culinary Specialty, Mountainside, N.J.	46 5ct.	9.00	414.00
			78 6ct.	9.00	702.00
5/2	35003	Four Seasons Produce, Denver, PA	20 6ct.	10.00	200.00
			20 7ct.	10.00	200.00

5/13	35033	Four Seasons Produce, Denver, PA	60 7ct.	10.00	600.00
			55 8ct.	10.00	550.00
5/13	35036	Crystal Valley Food, Miami, FL	9 (6 7ct., 3 8ct.)	9.00	81.00
5/14	35051	Cooseman Atlanta, Forest Park, GA	120 8ct.	.75	90.00
6/7	35050	Ambrosia Farms, Pompano, FL	217 (mix of 7 & 8's)	3.00	651.00
			762		$4,802.00

We thus arrive at three conflicting accountings; Fashion's summary accounting, our constructed accounting based on Fashion's invoices and statement of expenses, and the net proceeds actually paid by Fashion. These may be summarized as follows:

Fashion's summary acct.	Constructed acct.	Actual payment
First load:		
Gross sales: $5,142.00	$4,270.00	
Expenses: 2,888.60	2,888.60	
Net Proc.: $2,253.40	$1,381.40	$1,753.20
Second load:		
Gross sales: $5,066.00	$4,802.00	
Expenses: 2,137.65	2,137.65	
Net Proc.: 2,928.35	$2,664.25	$2,428.95

These inconsistencies are compounded when we consider the question of the number of cartons sold. Isaac Rosenberg stated that 275 cartons from the first load and 453 boxes from the second load were sent at Joe Natoli's direction to Natoli's customers, although 286 boxes from the 453 were returned. Rosenberg also stated

that these cartons were presumably re-billed by Complainant.[7] Rosenberg thus seeks to explain a failure to account for 275 cartons from the first load and 167 cartons from the second load. We would be disposed to countenance this failure to account for these cartons because Complainant, though the allegation was made early in the proceeding and repeated, never responded directly to it.[8] This would mean that Fashion had 699 cartons from the first load, and 1,037 cartons from the second load for which to account. However, the accounting which we constructed from the invoices supplied by Fashion show that only 597 cartons from the first load, and 762 cartons from the second load were sold.

Fashion submitted "Daily Inventory Control" sheets as to each load showing the number of cartons of each size sent under each invoice number. In further support of its contention that 275 cartons from the first load, and 473 cartons (initially) from the second load were sent to Complainant's customers, Fashion tagged certain invoice numbers with a "BA" to indicate that those pineapples were sent to Complainant's (Big Apple's) customers. Invoices representing 268 cartons were so tagged as to the first load, and invoices representing 806 cartons were so tagged as to the second load. Obviously Fashion's tagging is incorrect, since the number tagged would not leave sufficient cartons to cover the sales billed out by Fashion. A clear instance of this erroneous tagging is invoice 34088 which included 61 cartons of size 6's and 82 cartons of size 7's from the first load, and 59 cartons of size 6's and 38 cartons of size 7's from the second load, for a total of each size of 120 cartons. Fashion issued one invoice to JJ Produce Co. as to these 240 cartons. Only the cartons from the second load are tagged with a "BA." We conclude that Fashion has failed to prove that any cartons were shipped to Complainant's customers. Fashion must be held accountable for all the pineapples shipped to it.

Fashion alleged that when the first load arrived, it was inspected, and it was "found that the pineapples were not certified organic, were not all size 5, and had

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[7]Rosenberg claims that Fashion did not invoice any of the pineapples sent to Complainant's customers. (Answering statement, paragraph 8.) Mr. Rosenberg's exact words were: "Further, some of the pineapples, marked as "BA" on exhibits 2 and 12, were sent to Big Apples' customers per Joe Natoli's instructions. The pineapples sent to Big Apples' were not invoiced by Fashion Fruit at Natoli's instructions."

[8]Complainant made an implicit response by claiming reparation for all of the pineapples on both of the loads which it shipped to Fashion.

defects."[9] There does not appear to have been any representation by Complainant that the pineapples were going to be "certified" as organic. Indeed, one wonders who the certifying authority would be in such a case. Even if we accept the allegation that the size was not as represented, the sales of the pineapples fail to show any consistent difference as to price that is related to the size of the pineapples. The quality allegation is insupportable since Fashion did not secure a neutral inspection. However, Fashion did perform an in-house inspection, at least as to the second load, because a report of that inspection was submitted as an exhibit to Fashion's answering statement. That report states, in relevant part, as follows: "Color - fruit green to turning, few yellow; tops good green; tops full; occas. bruise; slty loose pack; slty irr size; sugar 10.5 to 13.5; no leakers; CUT GOOD; sound fruit but not as full of pack as last shipment." This description, from Fashion's own in-house inspector, denotes a good load of pineapples. As to the condition of the first load, Fashion had the burden of proving that it was defective in some way, and has not met that burden. We will assume that it too was a good load of pineapples.

We now arrive at the necessity of computing the correct amount which Fashion should have remitted to Complainant. If we had market reports for pineapples from the Dominican Republic, or for pineapples that we knew to be similar, we would use those reports. However, only a relatively small number of pineapples were imported from the Dominican Republic during the period in question, and we do not have any reports that we feel comfortable using. Therefore we will use the average of the higher sale amounts that were realized by Fashion. The lower sale figures, i.e., the $4.00 and $5.52 sales on the first load, and the $3.00 and $.75 sales on the second load will be excluded from our computation of an average sale price, and the cartons represented by these figures will be brought into our constructed accounting at our computed average price, as will the cartons for which Fashion did not account.

As to the first load Fashion's invoices show 126 cartons sold at $10.00 per carton and 196 cartons sold at $8.00 per carton, or an average price of $8.60, or a total for the 322 cartons of $2,768.00. The remaining 652 cartons were either unaccounted for, or sold at low prices without sufficient justification. These 652 cartons had a value, at $8.60 per carton, of $5,607.00. We conclude that the gross

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[9]Colozza, who represented the intermediary Choice, represented in an affidavit attached to Fashion's answering statement that Natoli had stated that the pineapples were "high quality organic pineapples," and "were of uniform size 5." Colozza does not say that they were to be certified as organic.

proceeds of the first load should have been $8,375.00. Fashion claimed as expenses cooling in the amount of $633.10 which we will allow; Trucking in the amount of $1,347.50 which we will allow; and "Misc." in the amount of $394.00. Without further description this amount must be disallowed. Fashion's claimed ten percent commission of $514.20 should be increased to $837.50. The total allowable expenses on the first load are $2,818.10. This amount deducted from the gross proceeds leaves $5,556.90 as the net proceeds which should have been paid by Fashion to Complainant on the first load.

As to the second load Fashion's invoices show 214 cartons sold at $10.00, 133 cartons sold at $9.00, and 78 cartons sold at $8.00, or an average sale price of $9.32, or $3,961.00. The remaining 779 cartons were either unaccounted for, or sold at low prices without sufficient justification. These 779 cartons had a value, at $9.32 per carton, of $7,260.28. We conclude that the gross proceeds of the second load should have been $11,221.28. Fashion claimed as expenses cooling in the amount of $722.00, which we will allow; Freight in the amount of 824.00, and trucking in the amount of $85.05, or 909.05, which we will allow. Fashion's claimed ten percent commission of $506.60 should be increased to $1,122.13. The total allowable expenses on the second load are $2,753.18. This amount deducted from the gross proceeds leaves $8,468.10 as the net proceeds which should have been paid by Fashion to Complainant on the second load.

The total which we have found owing from Respondent Fashion to Complainant is $14,025.00. Respondent Choice is liable to Complainant for $4,182.15 of such amount jointly and severally with Fashion. The failure of Respondents to pay these amounts to Complainant is a violation of section 2 of the Act.

Section 5(a) of the Act requires that we award to the person or persons injured by a violation of section 2 of the Act "the full amount of damages sustained in consequence of such violations." Such damages include interest.[10] Since the Secretary is charged with the duty of awarding damages, he also has the duty, where appropriate, to award interest at a reasonable rate as a part of each reparation award.[11] We have determined that a reasonable rate is 10 percent per annum.

Complainant was required to pay a $300.00 handling fee to file its formal

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[10] *L & N Railroad Co. v. Sloss Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *L & N Railroad Co. v. Ohio Valley Tie Co.*, 242 U.S. 288 (1916).

[11] See *Pearl Grange Fruit Exchange, Inc. v. Mark Bernstein Company, Inc.*, 29 Agric. Dec. 978 (1970); *John W. Scherer v. Manhattan Pickle Co.*, 29 Agric. Dec. 335 (1970); and *W. D. Crockett v. Producers Marketing Association, Inc.*, 22 Agric. Dec. 66 (1963).

complaint. Pursuant to 7 U.S.C. 499e(a), the party found to have violated Section 2 of the Act is liable for any handling fees paid by the injured party. Respondents are liable for this fee jointly and severally.

Order

Within 30 days from the date of this order Respondents shall pay to complainant, jointly and severally, as reparation, $4,182.15, with interest thereon at the rate of 10% per annum from July 1, 1998, until paid, plus the amount of $300.00.

Within 30 days from the date of this order Respondent Fashion shall pay to Complainant as reparation $9,842.85, with interest thereon at the rate of 10% per annum from July 1, 1998, until paid.

Copies of this order shall be served upon the parties.